United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

225

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,933

LARRY T. LEE
Appellant

v.

UNITED STATES
Appellee

Appeal from the United States District
Court for the District of Columbia

BRIEF ON BEHALF OF THE APPELLANT

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

I.

STATEMENT OF ISSUES PRESENTED

1. The Trial Court erred and abused its discretion by denying the Appellant's Motion for Suppression of the pre-trial photographic identification.

2. The in-court identification of the Appellant was not made independently of the illegal pre-trial identification and therefore should have been excluded from evidence.

This case has not been before this Court previously.

II.

REFERENCE TO RULINGS AND PARTIES

Pursuant to the requirements of Appeals Court Rule 8(f), the Appellant states that there are no rulings, opinions, memoranda, findings or conclusions, in the Trial Transcript Record which are presented herein for review and therefore the attention of the Court is not directed to specifics within the Transcript. The Trial Court's ruling on the Appellant's Motion to Suppress the pre-trial photographic identification is presented here for review and therefore the Court is requested to review:

(1) The Appellant's Motion to Suppress;

(2) The Trial Court's disposition of the Appellant's motion;

(3) The collection of nine black and white photos which were the basis of the photo identification which is presented herein for review, together with the photo of the lineup in which the Appellant was placed and identified. Both the series of photos and the lineup photo are presently in the possession of Mr. Sterling Smith of the District Court's Criminal Section, Room 1800, U. S. District Courthouse.

No transcript covering the Trial Court's disposition of the aforementioned Motion to Suppress has been prepared. The total record, therefore, of items (1) and (2) set out above is to be found in the Court File Jacket, which is presently lodged with the Clerk's Office, U. S. Court of Appeals, D. C. Circuit.

III.

STATEMENT OF THE CASE

The complaining witness, Mrs. Marion Kremer, a partner in the Empire Liquor Store, located at 1800 - 14th Street, N. W. in Washington, D. C., testified that at approximately 3:45 p.m. of February 26, 1970, two armed men committed a holdup of her liquor store. (T. 5, 6)[1]

Mrs. Kremer testified that two men entered the store

1. "T." will be used hereinafter to designate the Trial Transcript Record.

and waited while Mrs. Kremer finished waiting on a customer, and then one asked for some cookies. (T. 6) At this point the other man drew a gun and said to Mrs. Kremer, "This is a holdup". Mrs. Kremer immediately opened the cash register and gave them all of the money in it (T. 7), which was about $75.00. (T. 15) Both robbers took money from Mrs. Kremer and they fled on foot. (T. 15, 16)

At the time of the robbery, one other person, a clerk, Mr. James Pickens, was in the store also. (T. 11)

At trial the complaining witness, Mrs. Kremer, identified the Appellant as one of the robbers. (T. 11) She also identified the Appellant by a photographic identification on the day following the robbery (T. 17) and by lineup identification twelve days after the robbery, on March 10, 1970. (T. 26)

Mrs. Kremer identified one of the robbers for the Police, as standing between 5 feet 10 inches and 6 feet tall, having a bush haircut, a "wild bushy haircut". (T. 16) She said both robbers weighed about the same - 165 or 170 pounds, and were about the same height. (T. 16) She said both robbers were about 19 or 20 to 23 years of age and the Appellant was wearing a dark jacket. (T. 23) Mrs. Kremer identified the Appellant as the robber having

the bush haircut, and said that the Appellant's haircut was "not well-trimmed like the other gentleman and he was clear shaven." (T. 16)

Mrs. Kremer testified that the lighting in the store was a series of fluorescent lights with other lights on the walls. (T. 17) She testified that the two robbers were in her store about ten minutes. (T. 17)

The sales clerk, Mr. James Pickens, who was in the store at the time of the robbery with Mrs. Kremer, testified that one of the robbers wore a black jacket and had a bush haircut. (T. 35, 36, 37) Mr. Pickens testified that the robbers were in the store about five minutes, (T. 34) and that he stood and watched the two robbers while they were in the store. (T. 35) Mr. Pickens' testimony corroborated that of Mrs. Kremer's as to the details of the robbery; however, Mr. Pickens was unable to identify the Appellant, Larry T. Lee at trial (T. 36, 40), and likewise Mr. Pickens was unable to identify either of the robbers at the lineup at Police Headquarters on March 10, 1970 (T. 27). Mr. Pickens was not shown any of the photographs which Mrs. Kremer used on February 27, 1970 to make her photographic identification of the Appellant. (T. 40)

According to the testimony of Officer Joseph Kaclik, he obtained a warrant for the arrest of Larry T. Lee on the basis of the photo identification of Lee made by Mrs. Kremer after she viewed nine black and white photographs shown to her by Officer Kaclik. (T. 41) Officer Kaclik arrested Mr. Lee on March 5, 1970, at 1420 R Street, Northwest, Lee's residence. (T. 42, 82) Officer Kaclik searched the immediate area of the arrest, he said, but was unable to find a gun or a long black coat or black waist jacket. (T. 43) Officer Kaclik testified that the robbery report, prepared by Detective Awkard, identified the robbers as follows: "robber number one was twenty years old, five feet eleven to six feet tall, weighing 175 pounds, medium complexion, clean shaven, short hair, wearing a black leather jacket, armed with a dark gun, a snub-nosed revolver (T. 44, 45); robber number two was also a Negro male, twenty years old, about five feet ten to six feet tall, 170 pounds, medium complexion. He had an African haircut and he was wearing a brown jacket with dark pants and he was armed with a bronze colored revolver, with a long barrel." (T. 45)

The records of the District of Columbia Jail indicate that when Larry T. Lee was measured, at the Jail, on

March 5, 1970, following his arrest, he stood five feet ten inches, weighed 125, and had a slender build.

The Appellant, prior to trial, entered a Motion to Suppress (1) the lineup identification, and (2) the photo identification, on the grounds that both were violative of his right to Due Process as guaranteed by the Fifth Amendment. (See the Court File Jacket which is now in the possession of the Clerk's Office, U. S. Court of Appeals, District of Columbia Circuit. In the File Jacket will be found (1) the Motion to Suppress, and (2) the Court's Disposition as to both identifications. See also, T. 17, 18, and 39, 40.) The Trial Court granted the Motion to Suppress the lineup identification on the grounds that it was prejudicial to the Appellant, but denied the Motion to Suppress the photo identification.

At trial on July 27, 1970, the Appellant waived his right to a jury trial and elected to be tried by the Court. (T. 2, 3, 4) The United States Government brought as witnesses Marion Kremer, James Pickens, and Officer Joseph Kaclik. (See Transcript Index). The Defendant brought as witnesses Virginia Allen, Elsie Turner and testified himself. (See Transcript Index). The Court,

after considering all of the evidence and testimony presented, found that the Defendant, and present Appellant, Larry T. Lee, was guilty of one count of armed robbery and of two counts of assault with a dangerous weapon, (T. 98, 99) and sentenced the Appellant to four to twelve years for armed robbery, two to six years on each count of assault with a dangerous weapon, and ruled that said sentences were to run concurrently and concurrently with sentences then being served in Maryland. (Court File Jacket).

IV.

ARGUMENT

A.

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING THE APPELLANT'S MOTION FOR SUPPRESSION OF THE PRE-TRIAL PHOTOGRAPHIC IDENTIFICATION.*

The pre-trial photo identification of the Appellant was so impermissibly suggestive that its admission into evidence constituted a denial of Due Process to the Appellant, Larry T. Lee.

As set out above in the Statement of the Case, the complaining witness, on the day following the robbery,

*For this argument the Court should read pages 1 through 53 and pages 80 through 99 of the Trial Transcript Record.

was shown a series of nine black and white photographs in an effort to identify one or both of the robbers. All of the photos were of Negro males of varying complexions and hairstyles. The photographs, which at this writing are in the possession of Mr. Sterling Smith of the Criminal Actions Office, United States District Court for the District of Columbia, and which are identified in the Court's File Jacket as Defendant's Exhibit Number One, are of persons with the following hairstyles:

Photograph No. 1: short trimmed hair;

Photograph No. 2: trimmed hairstyle;

Photograph No. 3: short to medium trimmed bush haircut;

Photograph No. 4: short to medium trimmed bush haircut, wider on the sides than the others;

Photograph No. 5: the Appellant, Larry T. Lee. His hairstyle is clearly the only "wild bush" in the group of photos. Hair covers parts of ears, is untrimmed, flares widely on the sides and highly on top. Hair approximately three

inches long protrudes from the sides of the head. Hair three to four inches long protrudes from the top of the head. The Appellant Lee's thinness accentuates the longness of his hair.

Photograph No. 6: closely trimmed short bush;

Photograph No. 7: tightly curled hair, closely trimmed;

Photograph No. 8: short hairstyle, not a bush;

Photograph No. 9: short hairstyle, not a bush.

Counsel for the Appellant strongly urge this Honorable Court, and attorneys for the United States Government, to view the aforementioned photographs for themselves.

Inclusion of the Appellant's photograph in the aforementioned list of photos was highly prejudicial to the Appellant because his was the only photo showing a "wild bush" Afro hairstyle. The uncontested testimony of the two witnesses in the store at the time of the robbery was that one of the robbers had a "wild bushy haircut" or a "long, large bush". (T. 16, 35, 36, 37) The display of one distinctive photo showing a "wild bush" among other photos showing more conventional

hairstyles was impermissibly suggestive that the person in the photo with the "wild bush" was the robber, whether he actually was or not.

Considering the totality of circumstances surrounding the pre-trial photographic identification of the Appellant, as presented by the record, the photographic identification procedure was obviously so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification.

As the Supreme Court in Simmons v. United States, 390 U. S. 377, 19 L. Ed. 2d 1247 (1968) said, at page 1253:

> "(The Defendant) asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances." Citing, Stovall v. Deno, 388 U. S. 293, 18 L. Ed. 2d 1199.
>
> "...we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification." Citing, Stovall v. Deno, supra.

As to what factors must be considered, in evaluating the "totality of circumstances", the Supreme Court is of further assistance where it holds, in United States v. Wade, 388 U. S. 218, 18 L. Ed. 2d 1149 (1967), at page 1165:

"We think it follows that the proper test to be applied in these situations is that quoted in Wong Sun v. United States, 371 U. S. 471: 'Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Citations omitted.

"Application of this test in the present context requires consideration of various factors; for example, the proper opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the Defendant's actual description, any identification prior to lineup of another person, the identification by picture of the Defendant prior to the lineup, failure to identify the Defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification."

In the instant case, the following factors must be taken into account as evidence of the fact that the impermissibly suggestive photographic identification gave rise to a very substantial likelihood of irreparable mis-identification.

The identification given by the complaining witness, Mrs. Kremer, immediately after the holdup varied greatly from the Appellant's actual description following his arrest.

Mrs. Kremer identified the robber with a "wild bush haircut" as standing between five feet ten inches tall and six feet, having a medium complexion, and weighing between 165 and 170 pounds. Larry Lee, when arrested

and taken to the District of Columbia Jail, stood five ten, and weighed 125 pounds. This latter fact is presently a part of the records of District of Columbia Jail.

Moreover, Mrs. Kremer, when testifying at trial, was asked by Appellant's counsel whether she thought the Defendant at trial met the description she gave to the arresting officer. The Transcript, at page 25 reads:

> "Q. Do you really think that the Defendant meets your description as being five foot ten to six feet tall and weighing 165 to 170 pounds?"
>
> "A. (by Marion Kremer) He is not that height, but he has lost about twenty pounds since I have seen him last."

Mrs. Kremer was correct in her estimation of the Appellant Lee's weight at trial, that is, approximately 140 pounds. But the salient fact is that Mr. Lee had <u>gained</u> fifteen pounds since his arrest. Again, by the records of D. C. Jail, Mr. Lee, on the day of his arrest, March 5, 1970, weighed 125 pounds.

As further indication that a substantial likelihood of irreparable mis-identification occurred at trial, it must be noted that of the two persons in the Empire Liquor Store at the time of the robbery, only one could make a positive identification of the Appellant, Mr. Lee,

where both witnesses had equal opportunity to observe both robbers.

A "wild bush" hairstyle is extremely dramatic and noticeable. One photograph of a person having a wild bush haircut among a collection of photographs of persons having more conventional hairstyles is nearly as distinctive as one photograph of a Caucasian among a collection of photographs of Negroes. The wild bush hairstyle, as jauntily worn by, in all likelihood, 20,000 young persons in the Greater Washington Metropolitan Area, conveys a considerable impression to observers concerning the person wearing it. The wild bush hairstyle, apart from the highly distinctive appearance, conveys certain impressions as to attitude, age and ethnic or philosophical conviction. That is to say, the wild bush hairstyle which the Appellant was shown to be wearing in his photograph is one of the most highly distinctive and noticeable physical characteristics which can be used to distinguish one person from another.

The Trial Court ruled that the lineup identification was inadmissible because prejudice existed against the Appellant due to his Afro-bush hairstyle as he stood in the lineup. At the time of the lineup Larry Lee's hair had been trimmed (T. 88) but the Trial Court still found

prejudice. A fortiori, if prejudice existed with his hair trimmed, then prejudice also existed, only more so, in the display of Larry Lee's photo showing his hair untrimmed and bushy. The photo of Lee used in the photo identification is dated January 15, 1970 and was taken prior to when his hair was trimmed. (T. 87, 88)

Inclusion of the Appellant's photo showing his wild bush hairstyle with other photos, none of which shows a wild bush hairstyle, for the purpose of photo identification of a criminal reported to have had a "wild bush" at the time he committed the crime is so highly prejudicial against the Appellant that this Court must rule, as a matter of law, that the photo identification was impermissibly suggestive and gave rise to a very substantial likelihood of irreparable mis-identification.

B.

THE IN-COURT IDENTIFICATION OF THE APPELLANT WAS NOT MADE INDEPENDENTLY OF THE ILLEGAL PRE-TRIAL IDENTIFICATION AND THEREFORE SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE. **

Preliminarily, failure by trail counsel for the Appellant to object to the invalid in-court identification at trial should not preclude the Appellant from challenging

**For this argument the Court should read the same portions of the Trial Transcript Record as it read for Argument A.

that identification on appeal. The Appellant's trial counsel attempted to combat the reliability of the in-court identification on cross-examination but was unsuccessful. Challenging the in-court identification at trial in such manner, instead of simply lodging an objection, should not prevent a later challenge on appeal. This Court, in United States v. Hamilton, 137 U. S. App. D. C. 89, 420 F. 2d 1292 (CADC 1969), held, at page 1293, at footnote 5:

> "(Because the Defendant failed in discrediting the in-court identification at trial) the Government submits that Appellant is now precluded from attacking the in-court identification (on appeal), but we think that position is untenable. It was the Government, not the Appellant, that elicited the in-court identification for the jury. Appellant was free to combat the reliability of that identification by exploiting the potential of the photographic identification for mistake. That he might do without waiving any legal claim that the in-court identification was constitutionally improper. Compare Simmons v. U. S., supra, at note 4. It would have been the better part of wisdom to object to the in-court identification when the Government first prepared to put it in, but in the circumstances here we do not deem the failure to object to handicap our consideration of the point. In the determination of guilt or innocence the in-court identification was a vital item on the scale. The record before us is sufficiently full to enable us to proceed confidently to a decision on the merits. (Citations omitted) With this much of the purpose of an objection at trial otherwise served and Appellant's fate hanging so precariously on the in-court identification, we are impelled to deal with it."

Likewise, the in-court identification in the instant case is a "vital item on the scale". In fact, the in-court

identification constitutes the whole basis of the Appellant's appeal. Failure by this Court to deal with the in-court identification on the merits would constitute substantial injustice to the Appellant.

Inasmuch as the in-court identification of the Appellant by the complaining witness was not clearly and convincingly shown to have had a source independent of the unduly suggestive photographic lineup, the in-court identification must be excluded from evidence by this Court of Appeals.

As the Supreme Court in Simmons v. U. S., supra, said at page 1253:

> "...We hold that each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification."

This jurisdiction follows closely the rule set out by the Supreme Court in Simmons, set forth above. United States v. Hamilton, 137 U. S. App. DC 89, 420 F. 2d, 1292, 1294 (D. C. Cir. 1969).

In United States v. York, 321 F. Supp. 539 (DCDC 1970), the District Court held, at page 542:

> "The rule in regard to photographic identification was laid out in Simmons v. U. S., and further explained in United States v. Hamilton, 137 U. S. App. DC 89, 420 F. 2d 1292 (1969). In Simmons the Court said the totality of the surrounding circumstances must be looked at, and the identification would be set aside only if it was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification.'"

The Appellant contends that the precise danger alluded to in the above quotations from cases, that is, impermissible suggestiveness, has occurred in the instant case. It cannot be said with any certainty that the complaining witness, Mrs. Kremer, would have recognized the Appellant at the time of trial if the illegal pre-trial identification had not occurred.

The Court, in United States v. Johnson, 412 F. 2d 753 (1st Cir. 1969), said at page 754:

> "The Supreme Court has recognized the danger that a witness exposed to an extrajudicial photographic identification will retain in his mind's eye the image shown in the photograph rather than that of the Defendant himself. Citing Simmons v. U. S., supra.
>
> "...If the pre-trial identification procedure is found to violate due process, before a new trial is granted, the Government should have the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the photographic identification."

In the instant case, admittedly, the robbers were in the Empire Liquor Store for a relatively long period of

time, five or ten minutes according to the testimony adduced at trial. Further, according to the testimony, the lighting in the liquor store apparently was sufficient.

However, it must be noted that of the two witnesses in the store at the time the robbery was committed, only one could make a positive identification whereas both witnesses had the same opportunity to observe the robbery. Mr. Pickens testified that he "stood there and watched" the two robbers during the whole time they were in the store, yet he was unable to identify Larry Lee as one of them.

Moreover, only that witness which was shown a photograph of the Appellant during a pre-trial identification was able to identify him during the trial. That witness, Mrs. Kremer, had the image in her mind's eye of seeing Larry Lee's photograph and of seeing Larry Lee in a pre-trial lineup.

In contrast, the other witness who observed the robbers for the same length of time with the same lighting conditions, Mr. Pickens, was shown no photographs and did not participate in a pre-trial photographic identification. At trial he was unable to identify the Appellant. This latter fact strongly indicates that without the illegal pre-trial

exposure to the Appellant and to his photograph, Marion Kremer would not have been able to identify the Appellant at trial, either.

As a further point that the in-trial identification did not proceed from an independent and legally unimpeachable source, the Court is asked to consider the fact that when the Defendant was identified at trial he was sitting, in blue prison garb, at the Defendant's table. It was most likely evident to everyone in the courtroom that Larry Lee was on trial as the Defendant in that proceeding. It is by no means fair to say that a complaining witness, when asked to identify the perpetrator of the crime, does so independently simply by pointing her finger at the only person sitting at the Defendant's table who is in prison garb.

Finally, as set out above, serious doubt as to the independence of the in-court identification is raised because of wide discrepancy between the police identification of the robber and the actual description of the Appellant. At trial, Marion Kremer completely confounded the in-court identification when she said "he is not that height (5 feet 10 to 6 feet tall) but he has lost about 20 pounds since I have seen him last." Actually, the Appellant had, during the interim period gained 15 pounds.

V.

CONCLUSION

The Appellant contends that the pre-trial photographic identification in this case was impermissibly suggestive because his picture showing him with a wild bushy hairstyle, a style that is highly distinctive and was in vogue in Washington, D. C. at the time of the crime, was the only wild bush hairstyle shown in the series of photographs. Such impermissible suggestiveness is indicative of a high likelihood of mis-identification, and since there is no clear and convincing evidence that the in-court identification stands on independent and legally unimpeachable sources, the Appellant contends that his conviction on all counts must be reversed.

Appellant further contends that any proper in-court identification would, at this point, be impossible, due to the images fixed in the complaining witness's mind by the pre-trial identifications, and that as a result, a fair trial cannot now be obtained. Therefore, the Appellant requests that his conviction be reversed and that his case be dismissed.

Alternatively the Appellant requests that his conviction

be reversed and remanded to the District Court for a new trial on all issues.

Alternatively, the Appellant requests that this Court consider its decision in United States v. York, 138 U. S. App. D. C. 197 , 426 F.2d 1191 (D. C. Cir. 1969), where the Government had argued that the record demonstrated that the Defendant's in-trial identification proceeded from independent, legally unimpeachable sources, and the Appellant urged contrarily that the record showed that the identification was irredeemably infected. The Court declared, at page 1193:

"While we are free to resolve such a controversy when the record is adequate for the purpose, we must reject both positions. The record before us is deficient at too many points to enable us to proceed with confidence toward a decision as to whether there was an independent source that would vindicate the identification...made at trial. Moreover it is evident that the Appellant's claims were not given the careful evidentiary exploration they deserve, perhaps in consequence of the erroneous ruling that pre-trial identification activities were rendered unimportant by the Government's resolve not to refer to them in the testimony.

We accordingly remand this case to the District Court for a hearing appropriate to investigation and resolution of the problem. If on the basis of evidence now of record or introduced at the hearing, the Government discharges its burden of establishing an independent source for Seifert's in-trial identification, Appellant's conviction will stand. If, on the other hand, the Government fails in that

> endeavor, with prejudice from the in-trial identification already apparent, Appellant will be awarded a new trial."

See also United States v. Wade, 388 U. S. 218, 18 L. Ed. 2d 1149, 1167 (1967), wherein the Supreme Court rendered an identical decision, remanding the case to the District Court for a determination of the validity of an in-court identification.

The Appellant in the instant case likewise requests that the Court of Appeals vacate the Appellant's conviction pending a hearing at the District Court level to determine whether the in-court identification had an independent source, and whether, in any event, the introduction of the pre-trial identification and the in-court identification of the Appellant constituted plain error.

Alternatively, the Appellant requests the Court to grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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. . . . . .

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief on Behalf of the Appellant was served on the attorney for the United States Government by mailing said Brief first class, postage prepaid. this_____day of_____, 1971, to John Terry, Esquire, United States' Attorney at the United States Attorney's Office, United States Courthouse, John Marshall Place at Constitution Avenue, N. W., Washington, D. C.

_____

Date:_____
Washington, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,933

UNITED STATES OF AMERICA, APPELLEE

v.

LARRY T. LEE, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
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JOHN A. TERRY,
JOHN S. RANSOM,
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Assistant United States Attorneys.

Cr. No. 681-70

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court properly admitted evidence of the pre-trial photographic identification of appellant?

II. Whether the trial court was correct in finding that Mrs. Kremer's in-court identification of appellant was independent of her suppressed lineup identification?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a four-count indictment filed April 21, 1970, appellant was charged with armed robbery, robbery, and two counts of assault with a deadly weapon. After a pretrial hearing on appellant's motion to suppress evidence, trial was held on July 27, 1970, before Judge Barrington D. Parker, sitting without a jury. Appellant was found guilty of armed robbery and the two counts of assault with a deadly weapon. On November 20, 1970, appellant was sentenced to four to twelve years on the armed robbery count and two to six years on each count of assault

with a deadly weapon, the sentences to run concurrently. This appeal followed.

The Pre-trial Hearing

Mrs. Marion Kremer, a part-owner of the Empire Liquor Store at 1800 14th Street, N.W., testified that her store was robbed by two armed men at approximately 3:30 p.m. on February 26, 1970 (M. Tr. 31).[1] There was a customer in the store when the two robbers entered (M. Tr. 34). After the customer left, one robber and then the other came over to Mrs. Kremer, who was behind the counter by the cash register. They stood one foot away from her while the robbery occurred (M. Tr. 35). The store was well lighted with twenty-five fluorescent bulbs and other lighting (M. Tr. 32, 34). The robbers were in the store approximately ten minutes, and Mrs. Kremer observed them this entire length of time (Mr. Tr. 34). She described the robbers to police as two young men nineteen to twenty-two years old, both of approximately the same height, 5′10″ to 5′11″, weighing 165 to 170 pounds, with one wearing a bush haircut (M. Tr. 25).

The day after the robbery, Officer Kaclik of the Metropolitan Police came to the Empire Liquor Store, handed a packet of nine black and white photographs to Mrs. Kremer, and asked her if she could identify any of the individuals in them (M. Tr. 20, 28). The photographs were presented to Mrs. Kremer with no suggestion that the police might have suspected any of the individuals depicted (M. Tr. 12, 28). She went through the photographs one by one, placing them back to back as she went through (M. Tr. 16, 37). The pictures were not arranged in any particular order (M. Tr. 15). Appellant's photograph was the fifth one she looked at (M. Tr. 16). When she came to it, she immediately put it aside and said "this [was] one of them" (M. Tr. 16, 38). After

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[1] The transcript on the hearing on the motion to suppress evidence will be cited herein as "M. Tr."; the transcript of the trial will be cited as "Tr."

looking at all the photographs, she said that she could not identify any of the others as the second man (M. Tr. 16).

A lineup was conducted on March 10, 1970, twelve days after the robbery, at which Mrs. Kremer again positively identified appellant (M. Tr. 13). Mr. James Pickens, an employee who was also in the store at the time of the robbery, did not identify anyone at this lineup (M. Tr. 13). A photograph of the lineup, introduced into evidence, disclosed that approximately three of the eight participants had bush haircuts (M. Tr. 13).

The trial court found that of the nine persons depicted in the photographs shown to Mrs. Kremer, at least five had bush haircuts (M. Tr. 45). Defense counsel agreed that the photographic array was not suggestive (M. Tr. 43, 45). The trial court also found in effect that Mrs. Kremer's in-court identification of appellant was based on her observations at the time of the robbery. The court ruled that testimony concerning the photographic identification would be admissible but excluded testimony concerning the lineup (M. Tr. 46-47).

The Trial

Mrs. Kremer amplified her pre-trial testimony concerning the robbery. She indicated that there were two eight-foot long counters in the store, with a space between them (Tr. 10). Mrs. Kremer was behind the cash register which was on the counter second from the front door. The clerk, Mr. Pickens, was behind the counter nearest the door (Tr. 11).

When she first saw him, appellant came in with another person and stood in front of the other counter (Tr. 12). She noticed that Mr. Pickens was not waiting on either man and that they appeared to be waiting for her (Tr. 29-30). After she finished waiting on a customer, the second man came toward her, and appellant followed. Both men then displayed guns and announced that this was a holdup (Tr. 13-14). Mrs. Kremer opened the cash drawer and gave the money to the two robbers (Tr. 15). Both of them then ran out (Tr. 16).

Mrs. Kremer described appellant at trial as 5'10" to 6' tall, weighing 165 or 170 pounds, with a bushy haircut and wearing a dark jacket (Tr. 23-25). In her estimation appellant had lost twenty pounds between the time of the robbery and the time of trial (Tr. 26). She testified concerning her identification of appellant's photograph on the day after the robbery (Tr. 17, 27), and on cross-examination defense counsel elicited evidence of her identification of appellant at the March 10 lineup (Tr. 26).

James Pickens was a clerk in the Empire Liquor Store on February 26, 1970, when the store was robbed. One robber initially stood on the other side of the counter from Mr. Pickens while the other one was closer to Mrs. Kremer (Tr. 38). Mr. Pickens did not give any description to the police. He could not identify anyone in court because he had not paid much attention at first and had become frightened when he saw the guns (Tr. 36).

Mrs. Virginia Allen and Mrs. Elsie Turner testified for the defense that it was appellant's practice to pick them up every day at approximately 4:30 p.m. at Freedmen's Hospital and drive them home (Tr. 53-79). Appellant testified that he always picked up Mrs. Allen and Mrs. Turner at Freedmen's Hospital between 4:00 and 4:30 p.m. (Tr. 84). He denied robbing the Empire Liquor Store (Tr. 86). He stated that he had never weighed more than 125 pounds and that he weighed 125 pounds on the date of the robbery (Tr. 87). He admitted that he had formerly worn his hair in a long Afro hair style but stated that he had had it "cut down a little" on the third Monday in February (Tr. 87-88). He remembered the date because that was when he saw his parole officer, and he reflected, "I believe I had it cut even before then" (Tr. 88).

ARGUMENT

I. The trial court did not err in admitting evidence of the pre-trial identification of appellant by photograph.

(Tr. 15, 23-26, 39, 87; M. Tr. 15-16, 37-38, 43, 45)

The use of photographic identifications in police investigative work has been specifically approved by the courts, *e.g.*, *Simmons* v. *United States*, 390 U.S. 377 (1968), and any identification based on photographs should initially be presumed valid. *United States* v. *York*, 321 F. Supp. 539 (D.D.C. 1970), *aff'd* —— U.S. App. D.C. ——, 440 F.2d 252 (1971). While the danger of suggestivity is always present in a photographic identification, the degree of suggestivity can be explored and placed before the trier of fact by cross-examination, *Simmons* v. *United States*, *supra*, 390 U.S. at 384, especially when, as in this case, the photographs have been preserved for use at trial. *See United States* v. *Clemons*, D.C. Cir. No. 23,577, decided May 14, 1971; *United States* v. *Kirby*, 138 U.S. App. D.C. 340, 427 F.2d 610 (1970); *cf. Patton* v. *United States*, 131 U.S. App. D.C. 197, 200, 403 F.2d 923, 926 (1968). The test is whether "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, *supra*, 390 U.S. at 384.

The trial court found no such impermissible suggestiveness in Mrs. Kremer's photographic identification of appellant.[2] There are several factors of prime importance which lend very substantial support to the trial court's conclusion: (1) Mrs. Kremer's excellent opportunity to observe appellant;[3] (2) the complete lack of any police

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[2] Nor did appellant's trial counsel, who stated, "I would not suggest that the photographs on February 27th were necessarily suggestive, but I would continue to feel that the lineup on March 10th was." (M. Tr. 45.)

[3] Mrs. Kremer observed appellant in a well-lighted store for ten minutes. She emptied her cash drawer and handed money to appellant while he was only a foot away (Tr. 15).

suggestion that there was a suspect among the photographs to be viewed;[4] (3) the fact that the photographic identification took place the day after the robbery while recollections were still fresh; and (4) the manner of Mrs. Kremer's viewing and the spontaneity of her selection of appellant's photograph.[5]

This last factor is of particular importance because of the reliance which appellant places on the alleged impermissible suggestiveness of his bush haircut. Mrs. Kremer had a stack of nine photographs in her hand. She went through them one at a time and put them back to back (M. Tr. 16, 37). Of the first four she looked at, at least numbers three and four had bush haircuts (see appellant's brief, p. 8). On turning to number five, without knowing what numbers six through nine would depict by way of haircuts, she immediately put number five aside, indicating that this was, in the officer's words, "one of them" (M. Tr. 16; see M. Tr. 37-38). Whatever suggestivity may inhere in the fact that appellant's haircut was the longest of the *entire* group is completely undercut by Mrs. Kremer's selection of his photograph prior to her viewing the last four photographs. There is no contention that appellant's photograph was not an accurate portrayal of him, and consequently there can be no suggestivity inhering in his photo itself.[6]

Two factors are cited by appellant as tending to indicate that a misidentification was made in this case: the fact that the witness Pickens was unable to identify appellant, and the alleged discrepancy concerning appellant's weight. These factors, we submit, were for the trial court as finder of fact to weigh, for they affect only

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[4] *See United States* v. *Williams*, 137 U.S. App. D.C. 231, 421 F.2d 1166 (1970).

[5] *See United States* v. *Thornton*, D.C. Cir. No. 24,235, decided July 7, 1971.

[6] We note that Officer Kaclik had this feature in mind when assembling the photographs and had attempted to get subjects with bush haircuts (M. Tr. 15). The length of appellant's hair, of course, was a factor beyond Officer Kaclik's control.

the weight to be given to the identification testimony and not its admissibility.

The failure of Mr. Pickens to identify appellant should not be considered significant. His testimony was hesitant and contradictory.[7] The court may well have determined that he lacked credibility, or simply that his powers of observation were so benumbed during the crime that his testimony was essentially worthless to either side. The trial court was in a position to evaluate Mr. Pickens' testimony accurately and was entitled to give it no weight at all.

The alleged misdescription of appellant's weight by Mrs. Kremer should likewise not be considered significant. To the police Mrs. Kremer described a robber 5'10" to 6' tall, then wearing a dark jacket, as being 165 to 170 pounds (Tr. 23-25). At trial, when she viewed appellant without any jacket, she estimated his weight at 145 pounds (Tr. 26). Appellant testified that he had never weighed more than 125 pounds (Tr. 87). Clearly, the trial court was in the best position to evaluate the significance of this conflicting evidence. Appellant was present in court. The court may well have concluded that it would be difficult if not impossible to estimate accurately

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[7] A sample of Mr. Pickens' testimony reveals its weaknesses:

Q. Would you be able to identify anybody participating in that robbery today in this courtroom?
A. I don't think so.
Q. Why not sir?
A. I wasn't paying that much attention to him. (Tr. 36.)

* * * *

Q. You didn't have a chance to observe number one?
A. No.
Q. Now let's take robber number two. He was the robber that was closest to you?
A. Yes. (Tr. 38.)

* * * *

Q. Did you have a good chance to observe number two robber?
A. I had a good chance, yes.
Q. Did you?
A. No, I didn't. I was watching the other fellow. (Tr. 39.)

the weight of a person who stood 5'10" tall, who was wearing a jacket, and who was in fact extremely thin.[8]

Making due allowance for the trial court's advantageous position in observing witnesses' demeanor, judging their credibility and weighing the evidence as presented,[9] it cannot be said that the court erred in finding that the photographic identification of appellant was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.[10]

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[8] This Court may find it helpful to view the full-length portrayal of appellant which appears in the photograph of the lineup held on March 10, 1970. This photograph is, we submit, more persuasive than the confusing assertion in appellant's brief that appellant weighed 140 pounds at trial (appellant's brief, p. 12), an assertion which directly contradicts appellant's own testimony that he never weighed more than 125 pounds (Tr. 87). We also note, and urge this Court to disregard, the assertion that the D.C. Jail records reflect that appellant weighed 125 pounds on the date of his arrest. Such record consists of nothing more than a card filled out by the individual arrestee, and in any event it is not a part of this record.

[9] *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 38, 408 F.2d 1230, 1241 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969).

[10] We must also reject the specious reasoning by which appellant attempts to find an invalidity in the photographic identification because of the trial court's ruling excluding evidence of the lineup identification. The court's reasons for excluding this evidence are not entirely clear. A fair reading of the record, however, suggests that out of an abundance of caution the court felt that it should apply a more strict standard regarding dissimilarity of physical characteristics to the lineup. The court found that five of the nine persons depicted in the photographic array had bush haircuts (M. Tr. 45). The record reflects an opinion by defense counsel (M. Tr. 43) that only two of the eight persons in the lineup had bush haircuts. The court may have concluded that it was appropriate to apply a stricter standard since the lineup occurred two weeks after the crime and since, at the lineup, there is an instantaneous overview of all participants, as opposed to the one-by-one view of a series of photographs which occurred in this case.

II. Mrs. Kremer's in-court identification of appellant was based on a source independent of her excluded lineup identification and was thus properly allowed.

(Tr. 12-16, 29, 46-47; M. Tr. 31-34)

The only issue we perceive concerning Mrs. Kremer's in-court identification of appellant is whether it had a source independent of her lineup identification which the trial court suppressed. Although the trial court did not explicitly so state, the record clearly reflects that the court felt that Mrs. Kremer's in-court identification was based on her observations at the time of the crime and was independent of the lineup identification (Tr. 46-47). The fact that the trial court suppressed evidence of the lineup identification and admitted Mrs. Kremer's in-court identification supports our reading of the record.

The court's finding of independent source has substantial evidentiary support. Mrs. Kremer observed appellant for ten minutes in the small area of the store. She took notice of him because he was not being waited on. Then, after appellant and his cohort had announced the robbery, he stood directly in front of her while she emptied her cash drawer and handed him the money. The store at the time was well lit by twenty-five fluorescent bulbs and other lighting (M. Tr. 31-34; Tr. 12-16, 29). On this record we submit that appellant has not met his heavy burden of establishing a lack of independent source. *United States* v. *(Clinton) Long*, 137 U.S. App. D.C. 275, 278, 422 F. 2d 712, 715 (1970).[11]

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[11] The finding of independent source is also substantiated by Mrs. Kremer's photographic identification of appellant prior to the lineup. This Court in *(Anthony) Long* v. *United States*, 137 U.S. App. D.C. 311, 315, 424 F.2d 799, 803 (1969), has stated with regard to the test for independent source: "We believe that this test is satisfied if it is shown that prior to the tainted confrontation the witness was capable of making a spontaneous identification of the suspect based upon his observations at the time of the offense."

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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